BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JEFFERY SCOTT HUBER	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 1,031,266;
UNITED BUILDING CENTERS	)	1,031,267; 1,032,076;
Respondent	)	& 1,032,077
AND	)	
	)	
TRAVELERS PROPERTY CASUALTY	)	
COMPANY OF AMERICA	)	
Insurance Carrier	)	

ORDER

Respondent appeals the May 16, 2007 Order For Compensation of Administrative Law Judge Pamela J. Fuller. Claimant was awarded temporary partial disability compensation commencing from and after December 14, 2005, the payment of medical treatment as provided claimant by J. Raymundo Villanueva, M.D., and the payment of medical treatment for claimant's eye injury as provided by Dr. Fry. Respondent does not dispute the treatment ordered for claimant's eye injury (Docket No. 1,031,266). Respondent also agrees that claimant suffered a work-related injury to his back and neck on May 12, 2006 (Docket No. 1,031,267). Respondent disputes that the injuries suffered on October 13, 2006 (Docket No. 1,032,076) and November 14, 2006 (Docket No. 1,032,077) arose out of and in the course of claimant's employment.

Claimant appeared by his attorney, D. Shane Bangerter of Dodge City, Kansas. Respondent and its insurance carrier appeared by their attorney, Brian R. Collignon of Wichita, Kansas.

The Appeals Board (Board) adopts the same stipulations as the Administrative Law Judge (ALJ) and has considered the same record as did the ALJ, consisting of the transcript of the Preliminary Hearing from May 9, 2007, with exhibits; the Deposition of Connie Bonwell taken on April 30, 2007; the Discovery Deposition of Jeff Huber taken on December 4, 2006; the Deposition of David Hagen taken on January 29, 2007; the Deposition of Dan McKenna taken on January 29, 2007; the Deposition of Tony Palacio taken on January 29, 2007; the Deposition of Lee Stowe, II, taken on January 29,

2007; the Deposition of Randall D. Jackson taken on April 30, 2007; the Deposition of Joshua Helpingstine taken on February 15, 2007; and the documents filed of record in this matter.

ISSUES

The only issue raised by respondent in its Request For Review filed May 30, 2007, is as to the compensability of the last three of claimant's four injuries. Respondent acknowledges the eye injury and initial back and neck injuries arose out of and in the course of claimant's employment with respondent. However, respondent argues the injuries suffered to claimant's back and neck on October 13, 2006, and November 14, 2006, were the result of horseplay or, in the alternative, non-work-related aggression by co-workers against claimant, which aggravated claimant's back and neck injuries. As the October 13, 2006, and November 14, 2006 injuries were intervening injuries to claimant's back, respondent should not be responsible for future medical treatment for the May 12, 2006 injury.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant has suffered four injuries while working for respondent. The first injury to claimant's eyes, suffered on December 14, 2005, is not disputed, and the award of medical treatment by the ALJ remains in full force and effect. The second injury, suffered on May 12, 2006, is not disputed by respondent. However, respondent argues that the injuries suffered on October 13, 2006, and November 14, 2006, arose out of horseplay incidents and permanently aggravated claimant's back and neck injuries suffered on May 12, 2006. Respondent, therefore, requests the award of benefits for the last two injuries be reversed and further medical treatment for the May 12, 2006 injury be denied due to the two later intervening injuries.

Claimant began working for respondent in March 2002 as a truck driver. By December 2006, claimant was working as a truck driver, mechanic and shop supervisor. He, in essence, managed respondent's concrete plant. On May 12, 2006, claimant was pulling an electric motor off a stand at respondent's plant when he felt something tear in his back. Claimant also developed neck pain shortly after this incident. Respondent provided medical treatment for this injury, and claimant missed several weeks of work. Eventually, the pain in claimant's neck and back improved, and claimant returned to work in July of 2006.

On October 13, 2006, claimant and several workers were at respondent's plant participating in good-natured name-calling. Both claimant and respondent agree that good-natured ribbing and even occasional wrestling among co-workers were normal in respondent's plant. Involved in the banter was a co-worker named Joshua Helpingstine. Mr. Helpingstine preferred that his co-workers refer to him as "Josh" and not "Joshua." A discussion occurred between claimant and Josh as to why Josh preferred one name over the other. Josh ran across the room and put claimant in what appears to have been a headlock. This caused an immediate increase in claimant's neck and back pain, which had been improving since the May accident. Claimant also noted that radiating pain into his leg began developing over the next few days. This caused claimant to have to alter his work duties for respondent. Claimant was being treated by Dr. Villanueva, and reported the worsening the day after the incident. Claimant's neck and back slowly improved over the next month.

On November 14, 2006, claimant asked David Hagen, one of claimant's co-workers, to move a truck for him. When Mr. Hagen agreed, claimant threw the keys to Mr. Hagen, who proceeded to swat the keys away. As claimant bent over to pick up the keys, he called Mr. Hagen a "faggot". Mr. Hagen reacted by jumping on top of claimant and grabbing the back of claimant's neck. Claimant felt an immediate burning sensation in his neck. He advised his co-workers and again told Dr. Villanueva the next day. Claimant has received three injections in his neck as the result of these aggravations. Respondent argues the last two injuries to claimant's neck and back were the result of unauthorized horseplay and, therefore, non-compensable. Claimant argues either that the horseplay was a normal activity in respondent's plant, or the incidents were work-related assaults by co-workers and thus compensable.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[1]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[2]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an

[1] K.S.A. 44-501 and K.S.A. 44-508(g).

[2] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

> employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[3]

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.[4]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[5]

The fact that this claimant was injured at work is not in dispute. Therefore, the "in the course of" requirement is not at issue on this appeal. However, the phrase "arising out of" implies some causal connection between the accidental injury or injuries and the employment.[6] Respondent argues that claimant's second injury, while work related, was rendered non-compensable as the result of two horseplay incidents. Or, in the alternative, claimant's last two injuries were the result of non-work-related assaults by co-employees.

The Kansas Supreme Court, in the recent case of *Coleman*,[7] addressed the issue of horseplay in the workplace. The court, in *Coleman*, citing Stuart,[8] held that "[a]n employee is not entitled to compensation for an injury which was the result of sportive acts of coemployees, or horseplay or skylarking, whether it is instigated by the employee, or

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[3] K.S.A. 44-501(a).

[4] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

[5] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[6] *Rush v. Empire Oil & Refining Co.*, 140 Kan. 198, Syl. ¶ 1, 34 P.2d, 542 (1934).

[7] *Coleman v. Swift-Eckrich*, 281 Kan. 381, 130 P.3d 111 (2006).

[8] *Stuart v. Kansas City*, 102 Kan. 563, 171 Pac. 913 (1918).

whether the employee takes no part in it."[9] In *Coleman*, the court considered whether a non-participant in horseplay should be compensated for her injuries. In reversing a longstanding rule in Kansas, the *Coleman* court, citing 2 Larson's Workers' Compensation Law, § 23.02, 23-2 (1999), determined that a non-participating victim of horseplay may recover compensation. In this instance, it is not clear whether claimant was a willing participant in the horseplay activities. What is clear is that this respondent allowed these types of activities to occur on a regular basis. Both claimant and respondent's briefs discuss the interaction between co-workers as being common and good-natured. Additionally, it would be disingenuous for this respondent to allege it was not aware of these activities, as claimant had previously notified respondent of the problem with people grabbing his neck and the potential for added damage. Additionally, Mr. Hagen, the second employee to grab claimant, had been disciplined before for grabbing a supervisor. Participants in horseplay may recover compensation for an injury where the horseplay has become a regular incident of the employment.[10] This Board Member finds ample justification in this record to support a finding that this employer had allowed this type of horseplay, including roughhousing, to become a regular incident of the employment.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[11] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Respondent had allowed roughhousing to become a regular part of the employment. Any injury suffered during this roughhousing activity would arise out of claimant's employment.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order For Compensation of Administrative Law Judge Pamela J. Fuller dated May 16, 2007, should be, and is hereby, affirmed.

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[9] *Coleman* at 382.

[10] *Thomas v. Manufacturing Co.*, 104 Kan. 432, 179 Pac. 372 (1919).

[11] K.S.A. 44-534a.

IT IS SO ORDERED.

Dated this ____ day of September, 2007.

BOARD MEMBER

c: D. Shane Bangerter, Attorney for Claimant
Brian R. Collignon, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge